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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 133

ISAO HITAI, ALSO KNOWN AS MARIO ISAO HITAI,
PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 11–15; Pet. App. A1–A5) is reported at 343 F. 2d 466.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1965 (R. 16). The petition for a writ of certiorari was filed on May 12, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Congress can validly make distinctions based on racial factors in the terms and conditions on

which it admits aliens to this country for permanent residence.

STATUTES INVOLVED

The relevant provisions of the Immigration and Nationality Act of 1952, 66 Stat. 163 *ff.*, appear in the Appendix, *infra*, pp. 7–9.

STATEMENT

Petitioner, a native and citizen of Brazil, whose father, now deceased, was a native and citizen of Japan and a member of the "Japanese" or "Asiatic" race, and whose mother, a naturalized citizen of Brazil now living in that country, is also a member of the "Japanese" or "Asiatic" race, entered the United States on January 25, 1964, as a temporary visitor for pleasure (R. 8, pp. 1–3).[1] The time within which he was required to effect his departure, originally scheduled to expire on April 1, 1964, was subsequently extended to June 30, 1964 (R. 8, p. 1). In May 1964, deportation proceedings were commenced against him on the charge that he had violated the conditions of his permission to enter by accepting full-time employment (R. 8, pp. 1, 2). At a hearing before a special inquiry officer, petitioner acknowledged that he had been working full time as a hospital porter since shortly after his entry, and admitted his deportability (R. 8, p. 2).

[1] "R. 8" refers to the eight-page "Oral Decision of the Special Inquiry Officer" (Exhibit "A" to the petition for review in the court of appeals) appended to the record at page 8. "R. 9" refers to the five-page opinion and order of the Board of Immigration Appeals (Exhibit "B" to the petition for review) which appears at page 9 of the record.

Pursuant to Section 245(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1255(a), petitioner applied at the hearing for adjustment of his status to that of an alien lawfully admitted for permanent residence (R. 8, p. 2). The special inquiry officer denied the application on the ground that petitioner did not meet the statutory requirement that an immigrant visa be immediately available to the applicant at the time the application is approved[2] (R. 8, pp. 2–4). The officer noted that, although petitioner, in consequence of his birth in an independent country of South America, would otherwise be classifiable as a nonquota immigrant under Section 101(a)(27)(C) of the Act (Appendix, *infra*, p. 7),[3] the latter provision was subject to Section 202(b)(4) (Appendix, *infra*, pp. 8–9), which specifically governed petitioner's case.[4] Section 202(b)(4) de-

[2] Section 245(a) provides that "The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved." Applications for such relief may be submitted to and determined by the special inquiry officers who conduct deportation proceedings. 8 C.F.R. § 242.8(a).

[3] Section 101(a)(27)(C) defines a "nonquota immigrant" as including—among others—immigrants born in Canada, Mexico, Cuba, Haiti, the Dominican Republic, the Canal Zone, or any independent country of Central or South America.

[4] That Section 101(a)(27)(C) is in fact subject to Section 202(b)(4) is clear from the specific terms of Section 202(a)(5) (App., *infra*, pp. 7–8).

fines an area—described as "the Asia-Pacific triangle"—by geographical boundaries which include Japan, among other countries. It provides that an immigrant, born outside this triangle, who owes as much as one-half of his ancestry to a people or peoples indigenous to a quota area situated within it, is chargeable to the quota for that included area. Under this provision, the special inquiry officer noted, petitioner was chargeable to the quota for Japan, and no visa was then available under the quota for that country (R. 8, pp. 3–4).[5]

Petitioner was accordingly ordered deported to Brazil (R. 8, p. 8). On appeal to the Board of Immigration Appeals, the Board affirmed so much of the order as denied the application for adjustment of status (R. 9, pp. 2–3, 4), but granted petitioner the privilege of voluntary departure and modified the special inquiry officer's order accordingly (R. 9, pp. 4, 5). On petition for review (R. 4–7), filed pursuant to Section 106(a) of the Act, 8 U.S.C. 1105a(a), the court of appeals sustained the action of the executive authorities (R. 11–16; Pet. App. A1–A5).

ARGUMENT

Petitioner's sole contention—that Section 202(b)(4) of the Act is invalid because it imposes quota

[5] The officer further noted that, while the record did not foreclose the possibility that some of the Asiatic racial strains in petitioner's ancestry were other than Japanese, this possibility did not materially affect petitioner's situation, since, if such were the case, he would be chargeable, at best, to the Asia-Pacific quota (see § 202(b) (1), (5); and (6) (Appendix, *infra*, pp. 8–9)), and no visa was available under that quota either (R. 8, p. 4).

restrictions based upon considerations of racial ancestry—is plainly unsound. It has long been settled that Congress' power to exclude aliens entirely, or to admit them on such terms and conditions as it chooses to prescribe, is plenary and unfettered.[6] "[A]n alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe." *Knauff* v. *Shaughnessy,* 338 U.S. 537, 542. "Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. * * * [T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Galvan* v. *Press,* 347 U.S. 522, 531. Congress' plenary control over immigration includes the specific power to exclude aliens of particular races (see *The Japanese Immigrant Case,* 189 U.S. 86, 97, and cases

[6] See, *e.g.*, *Galvan* v. *Press*, 347 U.S. 522, 531; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588–589; *Knauff* v. *Shaughnessy*, 338 U.S. 537, 542; *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422, 425; *Low Wah Suey* v. *Backus*, 225 U.S. 460, 467–468; *Oceanic Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339–340; *Turner* v. *Williams;* 194 U.S. 279, 289–290; *The Japanese Immigrant Case*, 189 U.S. 86, 97; *Wong Wing* v. *United States*, 163 U.S. 228, 237; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 704–713; *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659; *The Chinese Exclusion Case*, 130 U.S. 581, 603–604.

cited). It follows that it has power to make racial considerations a basis for quota restrictions.[7]

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1965.

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[7] Petitioner's reliance on general language contained in the Charter of the United Nations (Pet. 7–8) is misplaced. As observed in *Vlissidis* v. *Anadell*, 262 F. 2d 398, 400 (C.A. 7), no provision of that Charter purports to regulate the immigration policies of member nations. There is no occasion, therefore, to consider what effect such a provision would have on our immigration statutes if there were one.

APPENDIX

The Immigration and Nationality Act of 1952, 66 Stat. 163 *ff.*, provides in relevant part:

SECTION 101 [8 U.S.C. 1101]. (a) As used in this Act—

* * * * *

(27) The term "nonquota immigrant" means—

* * * * *

(*c*) an immigrant who was born in Canada, the Republic of Mexico, the Republic of Cuba, the Republic of Haiti, the Dominican Republic, the Canal Zone, or an independent country of Central or South America, and the spouse or the child of any such immigrant, if accompanying or following to join him;

* * * * *

SEC. 202 [8 U.S.C. 1152]. (a) Each independent country, self-governing dominion, mandated territory, and territory under the international trusteeship system of the United Nations, other than the United States and its outlying possessions and the countries specified in section 101(a)(27)(C), shall be treated as a separate quota area when approved by the Secretary of State. * * * For the purposes of this Act, the annual quota to which an immigrant is chargeable shall be determined by birth within a quota area, except that—

* * * * *

(5) * * * any alien who is attributable by as much as one-half of his ancestry to a people or peoples indigenous to the Asia-Pacific triangle defined in subsection (b) of this section, unless such alien is entitled to a nonquota immigrant status under paragraph 27(A), 27(B), 27(D), 27(E), 27(F), or 27(G) of section 101(a), shall

be chargeable to a quota as specified in subsection (b) of this section: *Provided,* That the child of an alien defined in section 101(a)(27)(C), if accompanying or following to join him, shall be classified under section 101(a)(27)(C), notwithstanding the provision of subsection (b) of this section.

(b) With reference to determination of the quota to which shall be chargeable an immigrant who is attributable by as much as one-half of his ancestry to a people or peoples indigenous to the Asia-Pacific triangle comprising all quota areas and all colonies and other dependent areas situate wholly east of the meridian sixty degrees east of Greenwich, wholly west of the meridian one hundred and sixty-five degrees west, and wholly north of the parallel twenty-five degrees south latitude—

(1) there is hereby established, in addition to quotas for separate quota areas comprising independent countries, self-governing dominions, and territories under the international trusteeship system of the United Nations situate wholly within said Asia-Pacific triangle, an Asia-Pacific quota of one hundred annually * * *;

(2) such immigrant born within a separate quota area situate wholly within such Asia-Pacific triangle shall not be chargeable to the Asia-Pacific quota, but shall be chargeable to the quota for the separate quota area in which he was born;

(3) such immigrant born within a colony or other dependent area situate wholly within said Asia-Pacific triangle shall be chargeable to the Asia-Pacific quota;

(4) such immigrant born outside the Asia-Pacific triangle who is attributable by as much as one-half of his ancestry to a people or peoples indigenous to not more than one separate quota area, situate wholly within the Asia-

Pacific triangle, shall be chargeable to the quota of that quota area;

(5) such immigrant born outside the Asia-Pacific triangle who is attributable by as much as one-half of his ancestry to a people or peoples indigenous to one or more colonies or other dependent areas situate wholly within the Asia-Pacific triangle, shall be chargeable to the Asia-Pacific quota;

(6) such immigrant born outside the Asia-Pacific triangle who is attributable by as much as one-half of his ancestry to peoples indigenous to two or more separate areas situate wholly within the Asia-Pacific triangle, or to a quota area or areas and one or more colonies and other dependent areas situate wholly therein, shall be chargeable to the Asia-Pacific quota.

* * * * *

END